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In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRADEMAS IRON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered on June 1, 1960, modifying an order issued by the Board against Brandman Iron Company.

OPINIONS BELOW

The Board's decision and order (R. 13–19) [1] is unreported. The court of appeals filed no opinion in support of its original action. Its *per curiam* opinion denying the Board's motion for reconsideration (R. 22–23) is reported at 281 F. 2d 797.

[1] "R." refers to the separately bound Supplemental Appendix to this petition, which contains the entire certified record. No record was printed for use in the court of appeals.

JURISDICTION

The court of appeals entered its decree on June 1, 1960 (R. 19–21), and denied the Board's motion for reconsideration on August 15, 1960 (R. 22–24). A second Board motion for reconsideration, by the court *en banc*, was denied September 23, 1960 (R. 24). On November 3, 1960, Mr. Justice Stewart extended the time for filing a petition for certiorari to January 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether the court of appeals has power under Section 10(e) of the National Labor Relations Act to modify an order entered by the National Labor Relations Board, where the respondent, in a settlement agreement, had consented to the order and to its enforcement by the court.

STATUTE AND RULE INVOLVED

The relevant provisions of Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) and Section 101.9 of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (24 F.R. 9095) are set forth in Appendix A, *infra*, pp. 14–16.

STATEMENT

Following charges filed by the union,[2] the Regional Director of the Board issued a complaint against

[2] Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 20.

respondent company alleging that it had violated Section 8(a) (1), (3) and (4) of the Act by: (1) discharging employees because they had engaged in union activities and submitted evidence to an agent of the Board; (2) interrogating employees concerning their union membership and activities; (3) offering wage increases and other benefits to employees if they would abandon activities in behalf of the charging union or any other labor organization and vote against the charging union or any other labor organization in a Board-conducted election; (4) threatening employees with discharge or other reprisals for engaging in union activities, voting for the charging union or any other labor organization, or giving evidence to agents of the Board (R. 1–6).

Thereafter, the respondent, the union, and the Regional Director entered into a settlement stipulation[3] by which respondent waived all further proceedings before the Board and agreed to the issuance of a Board order directing it to (R. 8–9):

> 1. Cease and desist from:
>
> (a) Discouraging membership in * * * [the Charging Union] or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment because of membership or activity in such labor organization;

[3] Such stipulations are provided for in Section 101.9 of the Board's statements of procedure, which is set forth in Appendix A, *infra*, pp. 15–16.

(b) Interrogating its employees concerning their union activities, sympathies, or affiliation, and threatening its employees with loss of employment, reduction in work hours, loss of benefits, and other reprisals because of such activities;

(c) Making promises of wage increases and other benefits to its employees if they should abandon and repudiate their activities, sympathies, affiliation and support of * * * [the Charging Union], or any other labor organization;

(d) Making promises of wage increases and other benefits to its employees if they should vote against the Charging Union or any other labor organization in an election conducted by the National Labor Relations Board; and

(e) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist * * * [the Charging Union], or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Respondent further agreed (R. 9–10), by way of affirmative relief, to offer reinstatement to two employees; to reimburse three employees for back pay, in amounts ranging from $460 to $774; and to post notices of compliance.[4]

[4] The stipulation provided, however, that the portion of the complaint alleging that respondent had threatened employees with reprisals for giving evidence to Board agents, in violation of Section 8(a)(4), would be dismissed (R. 10–11).

In addition, the stipulation provided that "The United States Court of Appeals for any appropriate circuit may, upon application by the Board, enter its decree enforcing the order of the Board" issued in accordance with the stipulation, and that "The respondent waives all defenses to the entry of the decree * * *." (R. 11).

On January 7, 1960, the Board, approving the stipulation, entered an order following its terms in all respects, including the references to the charging union "or any other labor organization" quoted above (R. 13–17). On May 24, 1960, the Board, pursuant to the stipulation, petitioned the court below for a decree enforcing the order.

On June 1, the court of appeals, *sua sponte* and without opinion, modified the Board's order by striking the phrase "or any other labor organization" wherever it occurred, and, as so modified, enforced the order (R. 19–21). The Board filed a motion for reconsideration, which the court (Judge Cecil dissenting) denied on August 15 in a *per curiam* opinion (R. 22–23). The Board's motion for reconsideration of the ruling *en banc* was denied on September 23 (R. 24).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that it has power to modify an order which it believes is too broad, though the order was not contested before the Board, is contrary to Section 10(e) of the Act and decisions of this Court.

Section 10(e) of the Act (p. 15, *infra*) provides that "No objection that has not been urged before the Board * * * shall be considered by the

court * * *." The purpose of this provision is to give the reviewing court the benefit of the Board's views on disputed questions of fact and law, and hence, where such opportunity has not been afforded, it requires the court "to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389). Nor is there any doubt that Section 10(e) applies to objections to the terms of the order entered by the Board no less than to those going to the Board's unfair labor practice findings. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. See also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 496–501.

The *Cheney* case involved precisely the same kind of objection to a Board order as that involved here. In that case, the court of appeals, believing that the portion of the Board's order which banned the employer from "in any other manner" interfering with its employees' organizational rights was unjustified under *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, deleted that provision even though no objection to it had been filed with the Board. This Court, while recognizing that a court need not enforce an order "if the Board has patently

traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce", concluded that a broad order was not in that category, for its propriety depended upon the circumstances of the particular case (327 U.S. at 388–389). Accordingly, Section 10(e) required that any complaint respecting the propriety of the order first be presented to the Board, and, if it had not been, the reviewing court was precluded from inquiring into the matter.[5]

Similarly here, the provision of the order which the court of appeals deleted was not "outside the orbit of [the Board's] authority," but proper under particular circumstances. If, for example, credited employee witnesses were to testify that the respondent threatened to discharge them for membership in the charging union or any other union, or that it threatened to close the plant if any union came in, an order employing the phrase "any other labor organization" would be manifestly appropriate.[6] And by consenting to the entry of the order, respondent in effect assumed that the facts warranted the order and waived its opportunity to have the Board pass on the ques-

[5] Chief Justice Stone, being of the view that Section 10(e) was not a limitation on "the court's power to conform its own process to accepted legal standards," specially concurred on the ground that the broad order was justified on the "merits" (327 U.S. at 389–391).

[6] *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, relied on by the court below, does not hold to the contrary, but merely that, on the facts of that case, a broad order was unjustified. In that case, of course, the scope of the order was contested before the Board.

tion.[7] Therefore, here, as in *Cheney*, Section 10(e) barred the court from modifying the order on its own.[8] Indeed, since the complaint in this case specifically alleged that respondent had coerced its employees to abandon the charging union "or any other labor organization" (p. 3, *supra*), the court's action gratuitously presupposes that the Board could not prove the allegations of its complaint.

2. The view of the court below that it had power *sua sponte* to modify the Board's order in this case apparently stems from a belief that the decision of this Court in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, has authorized the reviewing court to exercise greater supervision over Board orders, even where they were not contested before the Board. This view is likewise reflected in the decision of the First Circuit in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 283 F. 2d 26, where that court made similar modifi-

[7] To be sure, in *Cheney* the case went to hearing and respondent then failed to file exceptions to the trial examiner's intermediate report recommending the order in question, whereas here respondent, at the outset, waived a hearing and consented to the entry of the order. That difference is of no relevance, however, for in both situations the effect of respondent's action was the same, i.e., to render the Board incapable of reviewing the factual basis for the order. That is, where no exceptions are filed to the trial examiner's intermediate report, Section 10(c) (see p. 14, *infra*) automatically makes his recommended order that of the Board, and, where there is consent to the entry of an order without a prior hearing, there is no record for the Board to review.

[8] Significantly, in its opinion denying rehearing (R. 23), the court below cited the concurring opinion of Chief Justice Stone in *Cheney* (see n. 5, *supra*).

cations in seven uncontested Board orders. On the other hand, in recent decisions not yet reported but set forth in Appendix B (pp. 17–23, *infra*), the Second Circuit, another panel of the Sixth Circuit, and the District of Columbia Circuit have all declined to modify orders which had been uncontested on the ground that such modification was barred by *Cheney*, which in their view was unaffected by *Communications Workers*. *National Labor Relations Board* v. *Combined Century Theatres*, 46 L.R.R.M. 2858 (C.A. 2, August 3, 1960); *National Labor Relations Board* v. *Murray Ohio Mfg. Co.*, 46 L.R.R.M. 2888 (C.A. 6, August 15, 1960); *Carpenters District Council of Detroit* v. *National Labor Relations Board*, No. 15604 (C.A.D.C., December 8, 1960). For the reasons previously given, we believe that the latter position is correct. It is appropriate that this Court grant certiorari in this case to resolve that conflict between and within[9] the circuits. The Board also

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[9] The intra-circuit conflict between the decisions of different panels of the Sixth Circuit in this case and in the *Murray* case is a particularly sharp one. In both cases the court had originally modified an uncontested Board order thought to be too broad, and in both cases the Board moved for reconsideration. The motions for reconsideration were both decided on the same day, August 15, 1960. Circuit Judges Cecil and Weick sat in both cases and were divided in both. In *Murray*, the third member of the panel, Judge Miller, joined Judge Cecil in reinstating the Board's original order without modification, Judge Weick dissenting (p. 19, *infra*). In the instant case, the third member of the panel was Judge Martin, who joined with Judge Weick in denying the motion for reconsideration, thus casting Judge Cecil in the dissenting role (R. 23). It was because of that conflict that the Board then moved for reconsideration *en banc*, but that motion was denied (R. 24).

intends to file similar petitions in some of the First Circuit cases.

3. Since this Court's decision in *Communications Workers* v. *N.L.R.B.*, 362 U.S. 479, the Board has attempted to insure that broad orders are used only in situations where they are justified by the facts of the particular case. See *Central Rigging and Contracting Corp.*, 129 NLRB No. 37; *Local Union 322, Lumber Drivers (Republic Wire Corp.)* 129 NLRB No. 45; *International Hod Carriers, Local 78 (Knowlton Construction Company)*, 129 NLRB No. 72. Accordingly, there is no reason to assume (cf. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 283 F. 2d 26, 31 (C.A. 1)) that, if the respondent in a consent case were to establish to the satisfaction of the Regional Director that a broad order was not warranted under the circumstances of the case, the Director would nevertheless insist upon such an order as a matter of course.[10] Moreover, if the respondent and the Regional Director cannot agree as to whether a broad order is appropriate, the respondent has the alternative of withholding his consent and requiring the Regional Director to establish the basis for such an order in a contested proceeding.

4. The consequence of the decision below is that no "broad" order, however appropriate in the particular circumstances, can be obtained by a consent procedure in which the parties stipulate to conclusions but not to subsidiary facts. Where a broad order is appropriate,

[10] The manual of instructions issued to Board field personnel states that "the remedy provided for in a settlement must not exceed that which would be expected from a fully favorable Board decision" (Sec. 10154).

the Board will be compelled, unless the respondent is also willing to stipulate to specific evidentiary facts, to go to contested litigation unwanted by both parties. Nor is the decision limited to broad orders, for its rationale would permit the court, *sua sponte*, to modify any other feature of a consent order which it did not deem proper. In view of the importance of consent orders to the Board's handling of its workload, such a rule would have a severe impact on the administration of the Act. See *Poole Foundry & Machinery Co.* v. *National Labor Relations Board*, 192 F. 2d 740, 742 (C.A. 4), certiorari denied 342 U.S. 954. Thus, during the last four fiscal years, approximately forty per cent of the unfair labor practice cases in which the Board issued a decision and order involved orders which were entered either with the express consent of the parties or summarily because of the absence of exceptions to the trial examiner's proposed order (see Section 10(c), p. 14, *infra*).[1] During approximately the same period, fifty per cent of the Board orders before the courts of appeals on petitions

[1] All unfair labor practice cases in which the Board issued decisions and orders

	Contested cases	Consent cases	No-exception cases	Total cases
1957	248	193	17	458
1958	353	210	42	605
1959	457	253	56	764
1960	544	244	99	887
Total	1,602	850	214	2,884

for enforcement or review were entered by the Board in similar fashion.[12]

The decision below is also out of harmony with the general policy of encouraging settlement agreements and avoiding costly and time-consuming litigation. See *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380, 383–384 (C.A. 6), certiorari denied, 320 U.S. 740; cf. Administrative Procedure Act, Sec. 5(b), 60 Stat. 239, 5 U.S.C. 1004(b). Moreover, it is contrary to the settled principle that the voluntary solution of the parties, particularly when embodied in an order or decree which there was both jurisdiction and power to enter, should not be rewritten by the court on review. See *Swift & Co.* v. *United States*, 276 U.S. 311, 328–329, 330–331; cf. *United States* v. *Wunderlich*, 342 U.S. 98, 100–101; *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298–299 (C.A. 1).

[12] Unfair labor practice cases in which petitions for enforcement or review were filed in the courts of appeals:

	Contested cases	Consent cases	No-exception cases	Total cases
1957	72	90	7	169
1958	114	113	4	231
1959	75	178	9	342
1960 Jan.–Mar.	79	49	10	118
Total	440	410	30	880

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1961.

APPENDIX A

Statute and Rule Involved

1. Section 10 of the National Labor Relations Act (61 Stat. 146, as amended, 29 U.S.C. 160) provides in part:

> Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *
>
> * * * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners * * * shall issue * * * a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof * * * such recommended order shall become the order of the Board and become effective as therein prescribed.
>
> * * * * *

(c) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

2. Section 101.9 of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (24 F.R. 9095) provides:

§ 101.9 *Settlement after issuance of complaint.*

(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the

proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in Washington, D.C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

APPENDIX B

Court of Appeals Decisions in Conflict With Decision Below

United States Court of Appeals for the Second Circuit

National Labor Relations Board, petitioner

v.

Combined Century Theatres, Inc., and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, AFL-CIO, Local No. 640, et al., respondents.

Per Curiam:

Upon the motion of the General Counsel for the National Labor Relations Board, our decision of May 2, 1960 [278 F. 2d 306] is amended so as to grant enforcement to the Board's order of March 11, 1959, as well as to the supplemental order of June 22, 1959, considered in our May 2, 1960 opinion.

Respondents' cross motion that the order of March 11, 1959 be granted enforcement only upon modification is denied. Respondents ask that the Board's order be narrowed in scope so as to exclude from its prohibitions unlawful conduct directed at employers and unions other than those as to which evidence of violations of the National Labor Relations Act was introduced. We need not consider the merits of respondents' contention that the order is too broad in scope, for the order was entered by the Board pur-

suant to a stipulation between the General Counsel and the respondents; having so stipulated, respondents, of course, took no exception to the order before the Board nor, indeed, did they challenge its propriety upon the original argument before this Court. In the face of the stipulation, and in the absence of any exception to the order taken before the Board or the showing of any extraordinary circumstances, the Court will not consider respondents' objections. *NLRB* v. *District 50,* 355 U.S. 453, 464 (1958).

We do not understand the Supreme Court's recent decision in *Communications Workers* v. *NLRB,* 362 U.S. 479 (1960), upon which respondents rely, to express any jurisdictional limitation upon the Board's power, the excess of which we might consider even in the absence of proper exception, but rather to mean only that the evidence before the Board must be such as to justify not only the character but also the breadth of the Board's order. Questions as to the sufficiency of the evidence will, of course, be considered by the Court upon review of the order only if they have been appropriately preserved.

J. EDWARD LUMBARD,
U.S.C.J.

STANLEY N. BARNES,
U.S.C.J.

J. JOSEPH SMITH,
U.S.D.J.

AUGUST 3, 1960.

United States Court of Appeals for the Sixth Circuit

No. 14175

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURRAY OHIO MANUFACTURING COMPANY, LAWRENCEBURG, TENNESSEE, DIVISION, RESPONDENT

ORDER

Before MILLER, CECIL and WEICK, *Circuit Judges*

This day this cause came on to be heard upon the motion of the petitioner National Labor Relations Board to reconsider a former order of this Court by which it amended a decree for enforcement submitted by consent of the parties hereto.

Upon consideration whereof, the Court finds that there was no objection made at the hearing before the Board, by counsel for respondent, to the language stricken from the decree by the amendment, and that by reason thereof, under authority of *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, the motion should be sustained.

It is therefore ordered, adjudged and decreed that the motion for reconsideration be sustained, that the consent decree as originally submitted be reinstated without the amendment, and that it be enforced as so reinstated.

WEICK, Circuit Judge, dissents. He would deny the motion.

(S) LESTER L. CECIL,
Circuit Judge.

AUGUST 15, 1960.

United States Court of Appeals for the District of Columbia Circuit

No. 15604

CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND, MACOMB, SANILAC, ST. CLAIR AND MONROE COUNTIES AND VICINITY, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided December 8, 1960

Before WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, *Circuit Judges*

BURGER, *Circuit Judge:* The petitioner asks us to set aside and the respondent asks us to enforce an order of the National Labor Relations Board which rested on findings that petitioner violated Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act as amended, by causing employers to discriminate unlawfully in hiring practices. We have jurisdiction under Sections 10 (e) and (f) of the Act.

The Board's order requires petitioner to cease and desist from causing or attempting to cause the employer, W. J. C. Kaufman Company, or any other employer, to discriminate against employees or applicants for employment by requiring them to obtain work permits, clearances or job referrals from petitioner as a condition of employment or from in any like or related manner restraining or coercing employees or prospective employees of Kaufman Com-

pany or any other employer in the exercise of rights under Section 7 of the Act. Additionally, petitioner is required to make restitution to a particular job applicant, one Bissonnette, for loss of wages because of unlawful discrimination against him, and to post specified notices.

* * * * *

[Statement of facts and discussion of unfair labor practice findings omitted.]

(3)

The order is attacked by petitioner on the ground that it applies not only to the Kaufman Company but to "any other employer" and to practices committed in "any like or related manner." In light of the Examiner's finding that the Harrison-Bissonnette episode "at most, is proof only of an isolated and accidental application" of the constitution and working rules, the scope of the Board's order is difficult to understand.[2] *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941), tells us that "the authority conferred on the Board to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally unlawful practices which it has neither found to have been pursued or persuasively to be related to the proven unlawful conduct."

However, it appears that no objection to the scope of the order was made before the Board. Exception was taken to the recommended order "insofar as * * * based on materials previously excepted to." But these exceptions all related to findings on dis-

[2] Petitioner's failure to raise this point to the Board is similarly puzzling. The Intermediate Report plainly put petitioner on notice with respect to the scope of the recommended order, and the Board adopted the recommendation.

crimination and agency. There were no findings as to the scope of the order; only the terms of the order describe its scope. Thus the exception taken "did not apprise the Board that petitioner intended to press the question now presented." *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255 (1943).

Petitioner argues that even absent objection before the Board this court now has power to modify the order in this respect. We think not. Several circuits seem to have held the reviewing court may so act because the enforcement order is the order of *the court*, not the order of the Board. See *National Labor Relations Board* v. *Local 111, United Bhd. of Carpenters*, 278 F. 2d 823 (1st Cir. 1960); *National Labor Relations Board* v. *Brandman Iron Co.*, 281 F. 2d 797 (6th Cir. 1960). The Sixth Circuit appears to have relied upon Mr. Justice Stone's concurring opinion in *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385 (1946). Circuit Judge Cecil dissenting in the *Brandman* case relies on the majority view in the *Cheney* case and his premise would seem to be correct. This is also the view of the Second Circuit. *National Labor Relations Board* v. *Combined Century Theatres, Inc.*, No. J-2740, 2d Cir., August 3, 1960.

In *National Labor Relations Board* v. *District 50, UMW*, 355 U.S. 453 (1958), the Supreme Court set aside the action of this Circuit which modified a Board order by changing the wording of a notice, saying that no "extraordinary circumstances" were shown to bring the case within the exceptions allowed under the controlling statute defining the scope of review. See also *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497–501 (1955). Petitioner neither claims nor describes any

extraordinary circumstances which would appear to warrant our now modifying the scope of what might seem to be an order which goes beyond the needs of the case. We do not read *Express Publishing* or similar cases in the Supreme Court as do the First and Sixth Circuits. We read those cases as precluding modification of the order by us unless the party challenging the order shows that he is within the exception to the rule; appellant has not done so. The order of the Board will be enforced.

Affirmed.

BAZELON, *Circuit Judge*, dissenting [as to unfair labor practice findings]: * * *.

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